

STATE OF MICHIGAN
COURT OF APPEALS

HOWARD J. SHOOLTZ,

Plaintiff-Appellee,

v

SCOTT CHAPPELLE,

Defendant-Appellant.

UNPUBLISHED

December 11, 2003

No. 242200

Clinton Circuit Court

LC No. 01-009253-CZ

Before: Talbot, P.J., and Owens and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of \$15,453.67 entered on plaintiff's behalf following a bench trial. Plaintiff had sued defendant claiming a violation of the Uniform Fraudulent Transfer Act (UFTA), MCL 566.34. We affirm.

In May 1998, Chappelle Development Company (CDC) sued plaintiff alleging, in pertinent part, a breach of contract.¹ In October 1998, plaintiff filed a counterclaim alleging that CDC breached the contract. In December 1999, a jury found that both parties breached their contractual obligations. But the jury found that only plaintiff incurred damages, and it awarded him \$5,840. In addition, plaintiff was awarded \$7,586.15 in case evaluation sanctions.

However, plaintiff was unable to recover on his judgment because of CDC's insolvency. Plaintiff filed the instant matter against defendant, contending that defendant received checks from CDC between September 1998 and November 1999 that were fraudulent transfers under the UFTA. Following a bench trial, the trial court agreed and entered judgment against defendant for \$15,453.67.

On appeal, defendant contends that the trial court erred in finding that CDC fraudulently transferred assets to defendant.² Specifically, defendant contends that the funds that were

¹ Until 1999, defendant was CDC's sole shareholder, officer, and director.

² We review a trial court's findings of fact for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A finding of fact is "clearly erroneous if, after a review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake has been
(continued...)

actually paid to defendant were from a third party—a “sweep account.” However, the evidence plainly established that defendant received checks issued by CDC. Although CDC received the funds by incurring additional debt to the sweep account, it was CDC that transferred the funds to defendant. Accordingly, the trial court did not clearly err in finding that CDC transferred assets to defendant.

Defendant also contends that the trial court clearly erred in finding that the transfers were fraudulent. Specifically, defendant contends that he gave equivalent value for the money because he incurred a debt to CDC. Defendant further notes that he fully repaid this debt to CDC. In other words, defendant contends that the checks were merely loans from CDC.

As noted by the trial court, however, the only evidence that the checks were “loans” came from defendant’s self-serving testimony to that effect. Although it appears that defendant ultimately “repaid” the money to CDC, the trial court found that this was merely an “effort to demonstrate or attempt to demonstrate that this was an arm’s length transaction, which, in fact, it was not.” In other words, the trial court did not find defendant to be a credible witness in this regard. We give “special deference to a trial court’s findings when they are based on the credibility of the witnesses.” *Draggoo, supra* at 429. Moreover, there is no document evidencing that the payments were a loan. Nor is there any other objectively verifiable evidence indicating that, at the time the checks were written, the checks represented a loan. Accordingly, the record is insufficient to disturb the trial court’s credibility determination. Consequently, we reject defendant’s contention of error.

Finally, defendant contends that the trial court erred in ruling that the totality of the circumstances demonstrated “an actual intent to hinder, delay or defraud” plaintiff, MCL 566.34(1)(a). MCL 566.34(2) provides as follows:

In determining actual intent under subsection (1)(a), consideration may be given, among other factors, to whether 1 or more of the following occurred:

- (a) The transfer or obligation was to an insider.
- (b) The debtor retained possession or control of the property transferred after the transfer.
- (c) The transfer or obligation was disclosed or concealed.
- (d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
- (e) The transfer was of substantially all of the debtor’s assets.
- (f) The debtor absconded.
- (g) The debtor removed or concealed assets.

(...continued)

made.” *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997).

(h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.

(i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

(j) The transfer occurred shortly before or shortly after a substantial debt was incurred.

(k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Initially, we note that defendant concedes that he was an insider, as defined in subsection (a). Defendant challenges the trial court's findings that subsections (d) and (e) justified a finding of actual intent to hinder, delay, or defraud plaintiff.

Defendant contends that the trial court erred in relying on subsection (d) because the checks were written before the judgment was entered. In fact, we note that all but one of the checks were issued to defendant before plaintiff filed his counterclaim against CDC. On the other hand, it is possible that the threat of litigation preceded the actual filing of plaintiff's counterclaim. Moreover, a \$10,000 check was written to defendant after plaintiff's counterclaim was filed. Accordingly, at least some of the money could fairly have been construed as a transfer in response to a lawsuit.

Defendant also contends that the trial court erred in relying on subsection (e) because the funds were transferred from the sweep account, rather than CDC's funds. However, as noted above, this argument is plainly without merit. Although the funds came from the sweep account, CDC wrote the checks. In addition, CDC owed the sweep account approximately \$350,000 in September 1999 and approximately \$250,000 in November 1999. Nevertheless, two checks written by CDC to defendant during those months totaled \$13,000. Any money passing through CDC in September 1999 and November 1999 constituted all of its assets. To the extent that the \$13,000 was transferred to defendant, this was a transfer of substantially all of CDC's assets. Accordingly, we do not believe that the trial court clearly erred in finding that subsection (e) supported a finding of an actual intent to hinder, delay, or defraud plaintiff.

Moreover, defendant authorized himself to receive \$13,000 in exchange for CDC incurring a simultaneous debt to the sweep account. Inasmuch as CDC was already insolvent at the time of defendant's decision to authorize this self-serving transaction, there is further support for the trial court's finding that the transaction was fraudulent. Indeed, while defendant authorized himself to receive money from CDC, it is apparent that defendant would not allow CDC to incur debt to satisfy its judgment. It appears that defendant used the relationship between CDC and the sweep account to favor his own financial interests. Allowing the CDC to selectively incur debt suggests an intent to prevent plaintiff (or any other creditor) from ever recovering. Under these unique circumstances, we are not persuaded that the trial court erred in finding that defendant had an actual intent to hinder, delay, or defraud.

Affirmed.

/s/ Michael J. Talbot

/s/ Donald S. Owens

/s/ Karen M. Fort Hood